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No. 01-301

Supreme Court, U.S.
FILED
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IN THE SUPREME COURT OF THE UNITED STATES

ANTHONY NEWLAND, *Petitioner,*

v.

TONY EUGENE SAFFOLD, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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IN THE SUPREME COURT OF THE UNITED STATES

No. 01-301

ANTHONY NEWLAND, *Petitioner,*

v.

TONY EUGENE SAFFOLD, *Respondent.*

ARGUMENT

CERTIORARI SHOULD BE GRANTED IN *SAFFOLD* TO RESOLVE THE CIRCUIT CONFLICT OVER AEDPA'S TOLLING PROVISION BY INTERPRETING THE MEANING OF "PENDING" IN A MANNER THAT IS CONSISTENT WITH CONGRESSIONAL INTENT

In his Brief in Opposition, Respondent asserts that the majority opinion in *Saffold* "properly defers to state court holdings" (Argument I), "does not conflict with other circuits" (Argument II), and "does not present an issue of substantial national importance" (Argument III). Despite Respondent's delay of over four and a half months in filing his original habeas corpus petition in the California Supreme Court, and despite that court's denial of the petition on the alternative ground of "lack of diligence," Respondent contends that the Ninth Circuit correctly held that he was properly pursuing his state collateral remedies because the California Supreme Court alternatively

ruled on the merits of his ineffective assistance of counsel claim. (Opp. at 4.) Respondent argues that the *Saffold* "majority's decision to toll the time Mr. Saffold spent pursuing his post-conviction remedies was highly deferential to state court procedures" (Opp. at 6) and that "[a]ny other result would force a petitioner to file a protective federal petition." (Opp. at 7.) Petitioner disagrees.

The majority opinion in *Saffold* disregards the California Supreme Court's alternative denial of the petition "for lack of diligence" and more importantly eviscerates the federal statute of limitations by interpreting AEDPA's tolling provision in a way that is inconsistent with "Congress's intent to encourage exhaustion of state court remedies without allowing prisoners to toll the limitations period indefinitely." *Gibson v. Klinger*, 232 F.3d 799, 807 (10th Cir. 2000); *Melancon v. Kaylo*, 259 F.3d 401, 407 (5th Cir. 2001). As pointed out by the Seventh Circuit in *Fernandez v. Sternes*, 227 F.3d 977 (7th Cir. 2000), *Saffold* should have disregarded the entire four and a half months between the court of appeal decision and the filing in the state supreme court because the Ninth Circuit's holding in *Saffold* cannot be reconciled with *Harris v. Reed*, 489 U.S. 255, 264, n. 10 (1989). "*Harris* holds that when a state court invokes a rule of forfeiture under state law and resolves the merits as an alternative ground, *both* rulings must be respected when the petitioner applies to federal court." 227 F.3d at 981. In short, the *Saffold* opinion cannot be read as being deferential to the California Supreme Court decision.[1/]

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1. It should be noted that in *In re Robbins*, 18 Cal.4th 770 (1998), the California Supreme Court rejected a suggestion that it eliminate the practice of citing procedural bars as a second ground for denial when the merits are addressed. The *Robbins* court explained that the "basis and continuing import of our procedural bars are something quite different" than "a means of promoting finality by insulating our judgments from federal court review." *Id.* at 778, fn.1. The court stressed that decades before the development of federal procedural bar case law "we recognized and imposed

Under the interpretation of "pending" advocated by the Seventh Circuit in *Fernandez*, Respondent would not have been forced to file a protective federal petition. Rather, he merely needed to make a timely request for further review by the California Supreme Court in order to be granted further tolling under AEDPA. In California, he could have done so in one of two ways. First, if the court of appeal denies relief, a petitioner may seek review in the California Supreme Court by way of a petition for review filed within 10 days. *See*, *Nino v. Galaza*, 183 F.3d 1003, 1006, fn.3 (9th Cir. 1999). Second, although petitions for review are "strongly preferred," a petitioner may instead file an original habeas petition in the California Supreme Court. *Id.* However, under California's "general rule regarding timeliness," a "habeas corpus petition must be filed within a reasonable time after the petitioner or counsel knew, or with due diligence should have known, the facts underlying the claim as well as the legal basis of the claim." *In re Harris*, 5 Cal.4th 813, 828, fn.7 (1993); *In re Clark*, 5 Cal.4th 750, 755 (1993) [A petitioner must "demonstrate due diligence in pursuing potential claims."].[2/]

Given Respondent's failure to file a petition for review within 10 days and given his delay of over four and a

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procedural bars as a means of protecting the integrity of our own appeal and habeas corpus process" and that imposition of state "procedural bars, including the untimeliness bar, continues to advance among other institutional goals, the integrity of our appeal and habeas corpus process. *Id.*

2. Contrary to Respondent's assertion that the California Supreme Court has not clarified the timeliness rules for post-conviction petitions in non-capital cases (Opp. at 9), the Ninth Circuit has recognized that *Clark* and *Harris* sought to clarify the untimeliness bar for both capital and non-capital cases. *See, e.g. La Crosse v. Kernan*, 244 F.3d 702, 704-705 (9th Cir. 2001). Furthermore, a California Supreme Court denial citing only "lack of diligence" for denial of a petition has been found to be an application of the untimeliness bar. *Id.* at 705. Consequently, this Court should reject Respondent's argument to the contrary. (Opp. at 6.)

half months in filing an original petition in the California Supreme Court alleging ineffective assistance of counsel, there can be no doubt that Judge O'Scannlain correctly observed in his *Saffold* dissent that "[u]nder any method of review, Saffold's delay falls substantially outside the period that *Nino* tolls for 'properly pursu[ed]' state post-conviction remedies."[3] In *Fernandez*, the Seventh Circuit noted that it was not possible to characterize Saffold's choice of filing an original petition as "a continuation of the earlier petition that keeps the initial petition 'pending' for purposes of § 2244(d)(2)" because Saffold "did not ask for leave to file an untimely petition for discretionary review of the appellate decision rejecting his claim." 227 F.3d at 981. Instead, Saffold's filing of an original petition was "more like an application for leave to commence a new collateral proceeding." *Id.*

Resolution of the issue presented in this case (whether the time during which a petitioner has failed to properly pursue his state collateral remedies falls within the meaning of "pending" set forth by 28 U.S.C. section 2244(d)(2)) is a matter of federal law. *Gibson v. Klinger*, 232 F.3d at 806; *Mills v. Norris*, 187 F.3d 881, 883 (8th Cir. 1999); *Barnett v. Lemaster*, 167 F.3d 1321, 1323 (10th Cir. 1999). Although the federal courts may be guided by state procedural law in determining the

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3. Consequently, it is not necessary to know the specific reason for the California Supreme Court's "lack of diligence" finding, and this Court should reject Respondent's argument that *Saffold* is not an appropriate case for certiorari because of an alleged "critical gap" in the record. (Opp. at 12.) According to Respondent, this "critical gap" is due to the California Supreme Court's failure to "make clear why" his petition "was not diligent" and because the record below is allegedly "silent on the issue of non-statutory tolling." (Opp. at 13.) However, the record is not silent on the equitable tolling issue. Although the *Saffold* majority chose to dispose of the case by creating *Saffold's* infinite tolling rule rather than addressing the equitable tolling issue, Respondent's equitable tolling argument was addressed and rejected both by the district court and by Judge O'Scanlain in his dissenting opinion. Appendix A at 17-18; Appendix B at 14-15; Appendix F at 4-7.

meaning of "pending" under federal law, Petitioner submits that the determination does not depend on the nature of the state law ruling in the case or even in the final analysis on the actual state procedural rule or statute. For example, federal courts have held that AEDPA's one-year statute of limitations is not trumped by a state's more generous statute of limitations. *Tinker v. Moore*, 255 F.3d 1331, 1334-1335 (11th Cir. 2001); *Painter v. Iowa*, 247 F.3d 1255, 1256 (8th Cir. 2001) [affirming dismissal of federal petition as time barred under AEDPA's statute of limitations and rejecting argument by defendant that section 2244(d)(2) should be construed "to toll the statute of limitations during the entire three years allowed under Iowa law to apply for post-conviction relief because exhaustion of state remedies is a prerequisite for federal habeas relief and because principles of comity so demand."].

In *Tinker*, the Eleventh Circuit rejected the argument that AEDPA's statute of limitations forced the defendant to choose between exercising his right to meaningful access to the state courts under Florida's two-year limitation period and his right to petition for federal habeas relief. The *Tinker* court explained that:

> [W]e reject Tinker's "impermissible choice" argument. By virtue of statute, Tinker is provided both a state and federal forum in which to seek post-conviction relief. Despite his argument to the contrary, he need not forego his state remedy entirely in order to avail himself of the federal remedy. However, he must exercise it within one year of the date his judgment became final and do so in a manner that leaves him sufficient time to timely file his federal petition.

255 F.3d at 1334-1335.

Petitioner submits that the *Saffold* opinion is fundamentally flawed because of its misguided focus on "deference" to the California Supreme Court's decision to address the merits and because it refuses to address the fact that

resolution of the meaning of "pending" under AEDPA's statute of limitations involves a question of federal law (determining the intent of Congress) rather than the application of procedural bar case law (to determine whether federal courts should give deference to state procedural bars that may or may not be grounded on an independent and adequate state ground). As noted in *Tinker*, state prisoners, by statute, are "provided both a state and federal forum in which to seek post-conviction relief." 255 F.3d at 1334. The mere fact that a state is willing to entertain habeas corpus claims well beyond AEDPA's one-year statute of limitations (by way of its own more generous statute of limitations or by way of a state court's willingness to entertain a claim on the merits despite inordinate delay) should not be allowed to trump Congressional intent to "encourage exhaustion of state court remedies without allowing prisoners to toll the limitations period indefinitely." *Gibson v. Klinger*, 232 F.3d at 807; *Melancon v. Kaylo*, 259 F.3d at 407; *see Tinker v. Moore*, 255 F.3d at 1334-1335; *Painter v. Iowa*, 247 F.3d at 1256.

For example, if the state of California decided to enact a statute of limitations which provided that state prisoners had two years within which to file an original petition in the appellate court following a superior court denial of a prior petition and another two years to file an original petition in the state supreme court following denial by the state appellate court, surely federal courts should not allow such a state statute to effectively override Congressional intent by ruling that AEDPA's one-year statute of limitations must be tolled for an additional four years out of deference to the state statute of limitations. The fact that AEDPA's federal statute of limitations might require state prisoners to raise their state claims earlier than they would be required to file under state law does not deprive them of either their state or federal remedy. If a state prisoner wishes to exercise both his state and federal remedies, he must exercise his state remedy within one year of the date his judgment became final (plus Congressionally

sanctioned tolling) and do so in a manner that leaves him sufficient time to timely file his federal petition. 255 F.3d at 1334-1335.

Saffold's interpretation of AEDPA's tolling provision has effectively eviscerated AEDPA's statute of limitations by allowing indefinite tolling as long as a state court addresses the merits. The *Fernandez* court correctly stated that "[u]nder the majority's approach in *Saffold*, if a prisoner let ten years pass before seeking a discretionary writ from the state's highest court, that entire period would be excluded under § 2244(d)(2) as long as the state court denied the belated request on the merits." 227 F.3d at 980; *accord*, *Melancon v. Kaylo*, 259 F.3d at 406-407 [rejecting *Saffold* and agreeing with the concern expressed by the Seventh and Tenth Circuits in *Fernandez* and *Gibson* "over the potential for indefinite tolling."]. As explained by the court in *Romero v. Roe*, 130 F.Supp.2d 1148 (C.D. Cal. 2001), the *Saffold* decision was not based on

> temporal considerations. Rather, what made the four-month delay inconsequential was the fact that the state court decided, at least in part, the tardily-filed petition on the merits. . . . It was not the particular length of the delay that was crucial to the court's decision, but rather how the state court treated the tardily-filed petition.

130 F.Supp.2d at 1150.

The view that *Saffold* permits indefinite tolling has recently been confirmed by the Ninth Circuit in *Welch v. Newland*, No. 00-15366, ___ F.3d ___, 2001 WL 1111946 (9th Cir. Sept 24, 2001). In *Welch*, the district court dismissed a state prisoner's federal habeas petition for failing to satisfy AEDPA's one-year statute of limitations because he waited almost four and a half years after the state superior court's March 17, 1994, denial of his first state petition before he filed an original petition on different grounds in the California Supreme Court on August 22, 1998. In *Welch*, the Ninth Circuit stated that "[o]ur decision in *Saffold* turned, not on the length of the time gap between petitions, but on the fact that the

California Supreme Court had addressed Saffold's petition on the merits." *Welch v. Newland*, 2001 WL 1111946 at *2. The *Welch* court then explained that Welch's four and one-half year delay in filing did not defeat tolling under AEDPA because under the controlling authority of *Saffold* "the California Supreme Court's order denying Welch relief without comment or citation constituted a denial on the merits." *Id.* at *3.

In a concurring opinion, Judge Gould stated that he "was concerned that the application of the rule of *Saffold* here operates substantially to frustrate the intent of Congress in imposing a one-year limitations period for state prisoners filing federal petitions for habeas corpus in AEDPA." *Id.* at *4. He further stated that "*Saffold* leaves us" with the problem "that there is in effect no time limit whatsoever on state court proceedings" and that *Saffold* provides "no apparent way to resolve it." *Id.* at *4. Judge Gould then suggested that "[p]erhaps it would be desirable if the rule announced in *Saffold* were reexamined to determine if that rule should be maintained, modified, or rejected." *Id.* at *5.

Petitioner submits that the circuit conflict created by *Saffold* should be resolved by this Court granting certiorari in *Saffold*. It is unlikely that the Ninth Circuit will reexamine *Saffold* given that the Ninth Circuit has already rejected a petition for rehearing en banc in the instant case despite the fact that it was fully aware of the unanimous rejection of *Saffold* by the Seventh Circuit in *Fernandez*.[4/] Furthermore, even though the *Welch* case involves a more egregious disregard of the one-year statute of limitations, Petitioner submits that the instant case provides this Court with a more timely opportunity to clarify the meaning of "pending," thereby delineating the outside parameter of what constitutes Congressionally

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4. On September 25, 2000, nearly eight months prior to the denial of the petition for rehearing en banc in *Saffold*, Petitioner sent a written request to the Clerk of the Ninth Circuit asking that the active judges of the Ninth Circuit considering the petition for rehearing en banc be notified of the *Fernandez* decision.

sanctioned tolling as opposed to *Saffold's* infinite tolling rule. As each month passes, additional cases are added to the backlog of cases preserving the statute of limitations defense pending resolution of the *Saffold* case by this Court.

Petitioner requests that this Court consider the cogent statutory interpretation of "pending" recently set forth in *Robinson v. Ricks*, No. 00-CV-4526(JG), ___F.Supp.2d___, 2001 WL 1078356, at *8-12 (E.D.N.Y. Sept 07, 2001) and that this Court adopt the "plain meaning interpretation of 'pending'" set forth by that court. *Id.* at *12-13. In the alternative, Petitioner requests that this Court consider a bright line rule that no more than 90 days be tolled between each state court filing without a showing of improper state action that would justify further tolling. Such a rule would be consistent with this Court's 90-day time limit for filing petitions for writs of certiorari and with the California Supreme Court's outside limit of 90 days in capital cases for petitioners to receive the presumption that they have not engaged in substantial delay.

Petitioner requests that this Court grant certiorari because the correct interpretation of "pending"under 28 U.S.C. section 2244(d)(2) is an issue of substantial importance to the states and to prisoners filing petitions for habeas corpus relief. Uniform application of the statute of limitations cannot be reached until this Court provides a definition of "pending" that is consistent with Congressional intent.[5/]

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5. Given the "backdrop of widely divergent state procedural rules," and given the tendency of the Ninth Circuit and other federal courts to "stray from the principle that 'pending' means 'undecided,'" it is understandable that the federal courts to date have reached widely divergent conclusions on the meaning of "pending" under section 2244(d)(2). *Robinson v. Ricks*, 2001 WL 1078356, at *12.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Petition for Writ of Certiorari, the Petition for Writ of Certiorari should be granted.

Dated: October 2, 2001

Respectfully submitted,

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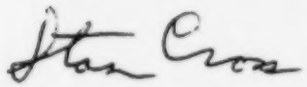

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JOINT

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SAFFOLD JOINT APPENDIX:

RELEVANT STATE COURT DOCKET ENTRIES

April 3, 1990	Saffold found guilty by jury of first degree murder, assault with a firearm and two counts of robbery in San Joaquin County Superior Court No. 40118.
July 2, 1990	San Joaquin County Superior Court sentenced Saffold to state prison for a term of 30 years to life.
July 6, 1990	Saffold filed a timely notice of appeal.
January 27, 1992	In case number C009223, the California Court of Appeal, Third Appellate District, filed an opinion in which it stayed the concurrent sentence for assault with a firearm and affirmed the judgment as modified.
March 4, 1992	Saffold timely filed a petition for review with the California Supreme Court in case number S025445.
April 15, 1992	In case number S025445, the California Supreme Court denied review of the opinion in Third Appellate District case number C009223.
April 20, 1992	The California Court of Appeal, Third Appellate District, issued a remittitur certifying that the January 27, 1992, opinion entered in case number C009223 had now become final.

May 1, 1997	The San Joaquin County Superior Court filed Saffold's petition for writ of habeas corpus in case number SC 40118A.
June 9, 1997	The San Joaquin County Superior Court denied the petition in case number SC 40118A.
June 18, 1997	The California Court of Appeal, Third Appellate District, filed Saffold's petition for writ of habeas corpus in case number C026811.
June 26, 1997	The California Court of Appeal, Third Appellate District, denied the petition in case number C026811.
November 13, 1997	The California Supreme Court filed Saffold's petition for writ of habeas corpus in case number S065746.
May 27, 1998	The California Supreme Court denied Saffold's petition for writ of habeas corpus in case number S065746.

RELEVANT DOCKET ENTRIES FOR UNITED STATES DISTRICT COURT EASTERN DISTRICT OF CALIFORNIA CASE NUMBER 98-CV-1040

TONY EUGENE SAFFOLD

petitioner

v.

ANTHONY NEWLAND

defendant

6/4/98	1	PETITION FOR WRIT OF HABEAS CORPUS from San Joaquin Superior Court #SC40118A; fee status request to proceed IFP, assigned to Honorable David F. Levi referred to Magistrate Judge John F. Moulds (kdc) [Entry date 06/08/98]
8/28/98	7	MOTION to dismiss by respondent Anthony Newland; and memorandum of points and authorities in support thereof (ms) [Entry date 09/10/98]
11/3/98	10	FINDINGS AND RECOMMENDATIONS by Magistrate Judge John F. Moulds RECOMMENDING that respondent's motion to dismiss [7-1] be GRANTED and this case be closed; REFERRED BACK to Honorable David F. Levi (cc: all counsel) (kdc)
1/6/99	14	ORDER by Honorable David F. Levi ORDERING CASE DISMISSED The findings and recommendations filed 11/3/98 are adopted in full; respondent's 8/28/98 motion to dismiss is granted and this action is dismissed (cc: all counsel) (gm)

1/6/99	15	JUDGMENT (cc: all counsel) (gm)
1/14/99	16	NOTICE OF APPEAL by petitioner Tony Eugene Saffold from District Court decision, (fee status due) (dbu) [Entry date 01/19/99]
2/25/99	17	ORDER by Honorable David F. Levi ORDERING certificate of appeal [16-1] GRANTED (cc: all counsel) (rb)

RELEVANT DOCKET ENTRIES FOR THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT CASE NUMBER 99-15541

TONY EUGENE SAFFOLD

Petitioner – Appellant

v.

ANTHONY NEWLAND

Respondent – Appellee

7/17/00	FILED OPINION: REVERSED and REMANDED. (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Betty B. FLETCHER; William C. CANBY, author; Diarmuid F. O'SCANNLAIN, dissenting) FILED AND ENTERED JUDGMENT. [99-15541] (rc)
7/31/00	[3960615] Filed original and 50 copies Appellee Anthony Newland petition for rehearing with suggestion for rehearing en banc in 15 pages; served 07/28/00. (PANEL) [99-15541] (je)
8/24/00	Filed Appellant Tony Eugene Saffold's response to petition for rehearing in 15 pages and 50 copies; served on 8/23/00. (PANEL and ALL active judges) [99-15541] (je)
5/23/01	Filed order and amended opinion (Judges Betty B. FLETCHER, William C. CANBY, Diarmuid F. O'SCANNLAIN,) (Orig. Opinion id:), The petition for enbanc rehearing IS DENIED. [3960615-1] [99-15541] (vt)

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

PEOPLE OF THE STATE
OF CALIFORNIA

Plaintiff and Respondent

vs.

TONY EUGENE SAFFOLD

Defendant and Appellant

3 Crim. C009223
San Joaquin 40118

REMITTITUR TO COUNTY CLERK

I, ROBERT L. LISTON, Clerk of the Court of Appeal of the State of California for the Third Appellate District, do hereby certify that the attached is a true and correct copy of the original opinion entered in the above entitled cause that has now become final.

WITNESS my hand and the seal of the Court affixed at my office this 20th day of April 1992.

[SEAL]

ROBERT L. LISTON, Clerk

By: G. KELLY Deputy

Receipt of the original remittitur in the above case is hereby acknowledged.

Dated:

County Clerk

By: Deputy

cc: see Mailing List

Name TONY EUGENE SAFFOLD

Address CSP-SOLANO

P.O. BOX 4000 / 6-220L

VACAVILLE, CA. 95696-4000

CDC or ID Number E-62266

/s/ LISA WILLIAMS

SUPERIOR COURT OF CALIFORNIA,

SAN JOAQUIN COUNTY

(Court)

TONY EUGENE SAFFOLD
Petitioner

vs.

Respondent
ANTHONY NEWLAND

PETITION FOR WRIT OF HABEAS CORPUS

No. SC40118A
(To be supplied by the Clerk of the Court)

INSTRUCTIONS – READ CAREFULLY

- Read the entire form *before* answering any questions.
- This petition must be clearly handwritten in ink or typed. You should exercise care to make sure all answers are true and correct. Because the petition includes a verification, the making of a statement that you know is false may result in a conviction for perjury.
- Answer all applicable questions in the proper spaces. If you need additional space, add an extra page and indicate that your answer is "continued on additional page."
- If you are filing this petition in the Superior Court, you need file only the original unless local rules require additional copies. Many courts require more copies.

- If you are filing this petition in the Court of Appeal, file the original and four copies.
- If you are filing this petition in the California Supreme Court, file the original and thirteen copies.
- Notify the Clerk of the Court in writing if you change your address after filing your petition.
- In most cases, the law requires service of a copy of the petition on the district attorney, city attorney, or city prosecutor. See Penal Code section 1475 and Government Code section 72193. You may serve the copy by mail.

Approved by the Judicial Council of California for use under Rules 56.5 and 201(f)(1) of the California Rules of Court [as adopted effective January 1, 1992]. Subsequent amendments to Rule 44(b) may change the number of copies to be furnished the Supreme Court and Court of Appeal.

Form Approved by the
Judicial Council of California
MC-275 [Rev. January 1, 1992]

This petition concerns

##	A conviction	_____	Parole
_____	A sentence	_____	Credits
_____	Jail or prison conditions	_____	Prison discipline
_____	Other *(specify)*: _____		

1. Your name Tony Eugene Saffold

2. Where are you incarcerated? CSP-Solano P.O. Box 4000 Vacaville, Ca. 95696-4000

3. Why are you in custody? [##] Criminal Conviction
   [ ] Civil Commitment

Answer subdivisions a. through i. to the best of your ability.

   a. If criminal conviction, state nature of offense and enhancements (for example, "robbery with use of a deadly weapon") or state reason for civil commitment: Murder/robbery with firearm & assault w/firearm and use of a firearm.

   b. Penal or other code sections: 187; 211; and 12022.5; 245(a)(2).

   c. Name and location of sentencing or committing court: San Joaquin County Superior Court Stockton, Ca.

   d. Case number: 40118

   e. Date convicted or committed: April 3, 1990

   f. Date sentenced: July 20, 1990

   g. Length of sentence: 30 years to life

   h. When do you expect to be released? Indeterminate sentence

   i. Were you represented by counsel in the trial court? [##] Yes. [ ] No. If yes, state the attorney's name and address: Ralph Cingcon and co-counsel Michael Platt, 125 Bridge PL Suite 201, Stockton, Ca. 95202.

4. What was the LAST plea you entered? (check one)
   [##] Not guilty [ ] Guilty
   [ ] Nolo Contendere [ ] Other _____

5. If you pleaded not guilty, what kind of trial did you have?
   [##] Jury [ ] Judge without a jury
   [ ] Submitted on transcript
   [ ] Awaiting trial

6. GROUNDS FOR RELIEF

   Ground 1: State briefly the ground on which you base your claim for relief. (For example. "the trial court imposed an illegal enhancement.") *If you have additional grounds for relief, use a separate page for each ground. Page 4 is designed so you can state ground 2. For additional grounds, make copies of page 4 and number the additional grounds in order.* Trial counsels (Ralph Cingcon and Michel Platt), provided ineffective assistance of counsel.

   a. Supporting facts:
   Tell your story briefly without citing cases or law. If you are challenging the legality of your conviction, describe the facts upon which your conviction is based. *If necessary, attach additional pages.* CAUTION: You must state facts, not conclusions. For example, if you are claiming incompetence of counsel you must state facts specifically setting forth what your attorney did or failed to do and how that affected your trial. Failure to allege sufficient facts will result in the denial of your petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.) A rule of thumb to follow is: *who* did exactly *what* to violate your rights at what time *(when)* or place *(where). (If available attach declarations, relevant records, transcripts, or other documents supporting your claim.)*

   Trial counsel and co- counsel failed to adequately prepare for a motion hearing to exclude identification evidence; and failed to inform the jury that witness Mrs. Michel had identified

someone else other than petitioner on two separate occasions as the perpetrator of the offense.

b. Supporting cases, rules, or other authority (optional):

(Briefly discuss, or list by name and citation, the cases or other authorities that you think are relevant to your claim. If necessary, attach an extra page.)

(See attached Memorandum of Points and Authorities)

7. Ground 2 (If applicable):

Defense counsel who represented petitioner, Ms. Patricia Ferguson, provided ineffective assistance of counsel for failing to request a physical linup.

a. Supporting facts:

Defense counsel failed to request a physical linup when it was warranted where the witness, Mrs. Michel, had only made a tentative identification of petitioner as the suspect and had identified someone other than petitioner as the suspect. Also another witness, Ms. Michelle Haye, had identified someone other than petitioner as the suspect.

b. Supporting cases, rules, or other authority:

(See attached Memorandum of Points and Authorities)

8. Did you appeal from the conviction, sentence, or commitment? [##] Yes. [ ] No. If your answer is yes, give the following information about your appeal:

Name of court ("Court of Appeal" or "Appellate Dept. of Superior Court")

Third Appellate District

Result Affirmed Date of decision January 27, 1992

Case number or citation of opinion, if known 3 Crim. C009223

Issues raised: a. Court gave erroneous jury instruction.

b. Shoe printed admitted in violation of Kelly-Frye.

c. Sentencing errors.

d. Jury did not reach unanimous decision on statutory law on murder

Were you represented by counsel on appeal? [##] Yes. [ ] No. If yes, state the attorney's name and address, if known. Kyle Gee 2626 Harrison Street Oakland, Ca. 94612

9. Did you seek review in the California Supreme Court?
[ ] Yes. [##] No. Result denied

Date of decision _____ Case number or citation of opinion, if known _____

Issues raised: a. Sentencing error.

b. Jury did not reach unanimous decision on statute for murder

c. _____

d. _____

10. If your petition makes a claim regarding your conviction, sentence, or commitment that you or your attorney did not make on appeal, explain why the claim was not made on appeal: Appellat attorney refused to raise issues on appeal. He informed me

that he do not file ineffective assistance of counsel claims.

11. Administrative Review:

a. If your petition concerns conditions of confinement or other claims for which there are administrative remedies, failure to exhaust administrative remedies may result in the denial of your petition, even if it is otherwise meritorious. (See *In Re Muszalski* (1975) 52 Cal.App.3d 500 [125 Cal.Rptr. 286].)

Explain what administrative review you sought or explain why you did not seek such review:

b. Did you seek the highest level of administrative review available? [ ] Yes. [ ] No.

Attach documents that show you have exhausted your administrative remedies.

12. Other than direct appeal, have you previously filed any petitions, applications, or motions with respect to this conviction, commitment, or issue in any court? [ ] Yes. If yes, continue with number 13. [##] No. If no, skip to number 15.

13. (1) Name of court _____

Nature of proceeding (for example, "habeas corpus petition") _____

Issues raised: a. _____

b. _____

c. _____

Result *(Attach order, if available)* _____ Date of decision _____

(2) Name of court _____

Nature of proceeding _____

Issues raised: a. _____

b. _____

c. _____

Result *(Attach order, if available)* _____ Date of decision _____

For additional prior petitions, applications, or motions, provide the same information on a separate page.

14. If any of the courts listed in number 13 held a hearing, state name of court, date of hearing, nature of hearing, and result.

_____

15. Explain any delay in the discovery of the claimed grounds for relief and in raising the claims in this petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.)

_____

16. Are you presently represented by counsel? [ ] Yes. [##] No. If yes, state the attorney's name and address, if known.

_____

17. Do you have any petition, appeal, or other matter pending in any court? [ ] Yes. [##] No. *If yes, explain.*

_____

18. If this petition might lawfully have been made to a lower court, state the circumstances justifying an application to this court.

I, the undersigned, say: I am the petitioner in this action. I declare under penalty of perjury under the laws of the State of California that the foregoing allegations and statements are true and correct, except as to matters that are stated on my information and belief, and as to those matters, I believe them to be true.

Date: April 17, 1997

/s/ Tony E. Saffold, Sr.
(Signature of Petitioner)

[LOGO]

CHAMBERS OF
The Superior Court
THIRD FLOOR COUNTY COURTHOUSE
STOCKTON, CALIFORNIA 95202

TELEPHONE
(209) 468-2827

MAY 23, 1997

RE: CASE# SC 40118 A
WRIT OF HABEAS CORPUS

DEAR MR. SAFFOLD,

WE RECEIVED A LETTER FROM YOU INQUIRING THE LENGTH OF TIME YOUR PETITION WAS RECEIVED.

THE ENVELOPE WAS POSTMARKED APRIL 21, 1997; HOWEVER, WE HAVE NO EXPLANATION OR KNOWLEDGE AS TO THE LENGTH OF TIME FOR MAIL TO GET TO US IN THE CLERK'S OFFICE. THE PETITION WAS RECEIVED AND FILED. A REPONSE OR ANSWER WILL BE GIVEN TO YOU FROM THE COURT AS SOON AS PRACTICABLE.

SINCERELY,

/s/ Lisa Williams
LISA WILLIAMS

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN JOAQUIN

In the Matter of the Petition of	)	CASE NO.
TONY EUGENE SAFFOLD	)	SC 40118A
	)	ORDER
For Writ of Habeas Corpus.	)	
	)	(Filed June 9, 1997)

It appearing that a petition for Writ of Habeas Corpus has been filed herein on May 1, 1997, and good cause appearing therefore,

IT IS HEREBY ~~ORDERED~~ THAT the petition is denied for the reasons stated below.

Petitioner was convicted of first degree murder, assault with a deadly weapon, and two counts of robbery. The conviction arises out of a robbery of the El Mexicano Restaurant which was owned by Augustin and Maria Michel. Evidence at trial indicated petitioner entered the restaurant/deli shortly after 7:00 a.m. on September 29, 1986, took a beer from a refrigerator, went to the cash registered, and, demanded that Augustin give him the money, pointing a gun at him. When Augustin said there was no money, petitioner fired twice, hitting Augustan once. Petitioner then threatened Maria with the gun, ordering her to give him the money from the cash registered, and fled. Augustan and Maria were the only ones present when the robbery occurred. Augustan died as a result of his gunshot wound.

Petitioner contends he received ineffective assistance from trial counsel because counsel failed to request a line-up prior to the preliminary hearing. Maria told the police

that she recognized the robber as someone who had been in the deli before as a customer. She identified petitioner from two separate photo line-ups within a few days after the robbery. It was the identification from a photo line-up that led to petitioner's arrest. Although Maria's photo line-up identification was somewhat tentative, the failure of petitioner's counsel to request a line-up was not ineffective representation. If Maria identified petitioner in a line-up, her identification of him would only be confirmed, diminishing the argument that her photo identification was weak. The likelihood that Maria would not identify him after having been exposed to two photographs of him was unlikely. It was reasonable for defense counsel to determine that a line-up was not worth the risk that the identification would only be confirmed.

Petitioner contends he received ineffective assistance of counsel because his attorney was not prepared to argue a pre-trial motion to exclude identification evidence and because his attorneys failed to adequately litigate the identification testimony. The Court has reviewed the transcript of the hearing on the motion to exclude identification evidence and finds that the delay in the motion was due to the failure of the prosecution to produce the original photo line-up. Petitioner's attorney demonstrated a high degree of competence by preserving motion options until the original photo line-up would be available and could be examined. There is no indication that the motion to exclude identification evidence was compromised or that petitioner was deprived of a potentially meritorious defense. Further there is no evidence that petitioner's counsel failed in any other manner to adequately litigate identification issues.

Petitioner contends he was deprived of effective assistance of counsel because his attorneys failed to call his mother and father, known alibi witnesses, to testify at his trial. Petitioner's parents testified at the preliminary hearing and were questioned about his whereabouts at the time of the robbery. Neither parent could affirmatively testify that petitioner was at home at the time. In view of their preliminary hearing testimony, it was reasonable for petitioner's attorneys to decide not to call them to testify at trial.

Date: [Illegible] /s/ Frank A. Grande
Judge of the Superior Court

Name TONY EUGENE SAFFOLD

Address CSP-SOLANO
P.O. BOX 4000 / 6-220L
VACAVILLE, CA. 95696-4000

CDC or ID Number E-62266

COURT OF APPEAL OF THE STATE OF CALIFORNIA,
THIRD APPELLATE DISTRICT
(Court)

TONY EUGENE SAFFOLD
Petitioner

vs.

Respondent
ANTHONY NEWLAND

PETITION FOR WRIT OF HABEAS CORPUS

No. 3 CRIM C 026811
(To be supplied by the Clerk of the Court)
See C009223

(Filed Jun. 18, 1997)

INSTRUCTIONS – READ CAREFULLY

- Read the entire form *before* answering any questions.
- This petition must be clearly handwritten in ink or typed. You should exercise care to make sure all answers are true and correct. Because the petition includes a verification, the making of a statement that you know is false may result in a conviction for perjury.
- Answer all applicable questions in the proper spaces. If you need additional space, add an extra page and indicate that your answer is "continued on additional page."

- If you are filing this petition in the Superior Court, you need file only the original unless local rules require additional copies. Many courts require more copies.
- If you are filing this petition in the Court of Appeal, file the original and four copies.
- If you are filing this petition in the California Supreme Court, file the original and thirteen copies.
- Notify the Clerk of the Court in writing if you change your address after filing your petition.
- In most cases, the law requires service of a copy of the petition on the district attorney, city attorney, or city prosecutor. See Penal Code section 1475 and Government Code section 72193. You may serve the copy by mail.

Approved by the Judicial Council of California for use under Rules 56.5 and 201(f)(1) of the California Rules of Court [as adopted effective January 1, 1992]. Subsequent amendments to Rule 44(b) may change the number of copies to be furnished the Supreme Court and Court of Appeal.

Form Approved by the
Judicial Council of California
MC-275 [Rev. January 1, 1992]

This petition concerns

###	A conviction	_____	Parole
_____	A sentence	_____	Credits
_____	Jail or prison conditions	_____	Prison discipline
_____	Other *(specify)*:	_____	

1. Your name Tony Eugene Saffold
2. Where are you incarcerated? CSP-Solano P.O. Box 4000 Vacaville, Ca. 95696-4000
3. Why are you in custody? [##] Criminal Conviction [ ] Civil Commitment

Answer subdivisions a. through i. to the best of your ability.

a. If criminal conviction, state nature of offense and enhancements (for example, "robbery with use of a deadly weapon") or state reason for civil commitment: Murder/robbery with firearm & assault w/firearm and use of a firearm.

b. Penal or other code sections: 187; 211; and 12022.5; 245(a)(2).

c. Name and location of sentencing or committing court: San Joaquin County Superior Court Stockton, Ca.

d. Case number: 40118

e. Date convicted or committed: April 3, 1990

f. Date sentenced: July 20, 1990

g. Length of sentence: 30 years to life

h. When do you expect to be released? Indeterminate sentence

i. Were you represented by counsel in the trial court? [##] Yes. [ ] No. If yes, state the attorney's name and address: Ralph Cingcon and co-counsel Michael Platt, 125 Bridge PL Suite 201, Stockton, Ca. 95202.

4. What was the LAST plea you entered? (check one)
[##] Not guilty [ ] Guilty
[ ] Nolo Contendere [ ] Other _____

5. If you pleaded not guilty, what kind of trial did you have?
   [##] Jury [ ] Judge without a jury
   [ ] Submitted on transcript
   [ ] Awaiting trial

6. GROUNDS FOR RELIEF

   Ground 1: State briefly the ground on which you base your claim for relief. (For example. "the trial court imposed an illegal enhancement.") *If you have additional grounds for relief, use a separate page for each ground. Page 4 is designed so you can state ground 2. For additional grounds, make copies of page 4 and number the additional grounds in order.* Trial counsels (Ralph Cingcon and Michel Platt), provided ineffective assistance of counsel.

   a. Supporting facts:
   Tell your story briefly without citing cases or law. If you are challenging the legality of your conviction, describe the facts upon which your conviction is based. *If necessary, attach additional pages.* CAUTION: You must state facts, not conclusions. For example, if you are claiming incompetence of counsel you must state facts specifically setting forth what your attorney did or failed to do and how that affected your trial. Failure to allege sufficient facts will result in the denial of your petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.) A rule of thumb to follow is: *who* did exactly *what* to violate your rights at what time *(when)* or place *(where). (If available attach declarations, relevant records, transcripts, or other documents supporting your claim.)*

   Trial counsel and co- counsel failed to adequately prepare for a motion hearing to exclude identification evidence; and failed to inform the jury that witness Mrs. Michel had identified

someone else other than petitioner on two separate occasions as the perpetrator of the offense.

   b. Supporting cases, rules, or other authority (optional):

   (Briefly discuss, or list by name and citation, the cases or other authorities that you think are relevant to your claim. If necessary, attach an extra page.)

   (See attached Memorandum of Points and Authorities)

7. Ground 2 (*If applicable*):

   Defense counsel who represented petitioner, Ms. Patricia Ferguson, provided ineffective assistance of counsel for failing to request a physical linup.

   a. Supporting facts:

   Defense counsel failed to request a physical linup when it was warranted where the witness, Mrs. Michel, had only made a tentative identification of petitioner as the suspect and had identified someone other than petitioner as the suspect. Also another witness, Ms. Michelle Haye, had identified someone other than petitioner as the suspect.

   b. Supporting cases, rules, or other authority:

   (See attached Memorandum of Points and Authorities)

8. Did you appeal from the conviction. sentence, or commitment? [##] Yes. [ ] No. If your answer is yes, give the following information about your appeal:

   Name of court ("Court of Appeal" or "Appellate Dept. of Superior Court")

Third Appellate District

Result Affirmed Date of decision January 27, 1992

Case number or citation of opinion, if known 3 Crim. C009223

Issues raised: a. Court gave erroneous jury instruction.

b. Shoe printed admitted in violation of Kelly-Frye.

c. Sentencing errors.

d. Jury did not reach unanimous decision on statutory law on murder

Were you represented by counsel on appeal? [##] Yes. [ ] No. If yes, state the attorney's name and address, if known. Kyle Gee 2626 Harrison Street Oakland, Ca. 94612

9. Did you seek review in the California Supreme Court?
[ ] Yes. [##] No. Result denied

Date of decision _____ Case number or citation of opinion, if known _____

Issues raised: a. Sentencing error.

b. Jury did not reach unanimous decision on statute for murder

c. _____

d. _____

10. If your petition makes a claim regarding your conviction, sentence, or commitment that you or your attorney did not make on appeal, explain why the claim was not made on appeal: Appellat attorney refused to raise issues on appeal. He informed me

that he do not file ineffective assistance of counsel claims.

11. Administrative Review:

a. If your petition concerns conditions of confinement or other claims for which there are administrative remedies, failure to exhaust administrative remedies may result in the denial of your petition, even if it is otherwise meritorious. (See *In Re Muszalski* (1975) 52 Cal.App.3d 500 [125 Cal.Rptr. 286].)

Explain what administrative review you sought or explain why you did not seek such review:

b. Did you seek the highest level of administrative review available? [ ] Yes. [ ] No.

Attach documents that show you have exhausted your administrative remedies.

12. Other than direct appeal, have you previously filed any petitions, applications, or motions with respect to this conviction, commitment, or issue in any court? [##] Yes. If yes, continue with number 13.
[ ] No. If no, skip to number 15.

13. (1) Name of court Superior Court of San Joaquin County

Nature of proceeding (for example. "habeas corpus petition") habeas corpus

Issues raised: a. Trial counsels provided ineffective assistance of counsel.

b. _____

c. _____

Result *(Attach order, if available)* denied Date of decision June 9, 1997

(2) Name of court _____

Nature of proceeding _____

Issues raised: a. _____

b. _____

c. _____

Result *(Attach order, if available)* _____ Date of decision _____

For additional prior petitions, applications, or motions, provide the same information on a separate page.

14. If any of the courts listed in number 13 held a hearing, state name of court, date of hearing, nature of hearing, and result.

_____

15. Explain any delay in the discovery of the claimed grounds for relief and in raising the claims in this petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.)

_____

16. Are you presently represented by counsel? [ ] Yes. [##] No. If yes, state the attorney's name and address, if known.

_____

17. Do you have any petition, appeal, or other matter pending in any court? [ ] Yes. [##] No. *If yes, explain.*

_____

18. If this petition might lawfully have been made to a lower court, state the circumstances justifying an application to this court.

_____

I, the undersigned, say: I am the petitioner in this action. I declare under penalty of perjury under the laws of the State of California that the foregoing allegations and statements are true and correct, except as to matters that are stated on my information and belief, and as to those matters, I believe them to be true.

Date: June 14, 1997

/s/ Tony Saffold
(Signature of Petitioner)

_____

IN THE
Court of Appeal of the State of California
IN AND FOR THE
THIRD APPELLATE DISTRICT

IN RE TONY E. SAFFOLD ON HABEAS CORPUS
Petitioner

3 Crim. C026811
Solano
(Filed June 26, 1997)

By the Court:

The petition for writ of habeas corpus is denied.

Dated: June 26, 1997

/s/ Davis
DAVIS, Acting P.J.

---

cc: See Mailing List

Name TONY EUGENE SAFFOLD

Address P.O. BOX 4000
VACAVILLE, CALIFORNIA
95696-4000

IN PROPRIA PERSONA

CDC or ID Number E-62266

CALIFORNIA STATE SUPREME COURT

(Court)

TONY EUGENE SAFFOLD
Petitioner

vs.

Respondent
A.C. NEWLAND, WARDEN

PETITION FOR WRIT OF HABEAS CORPUS

No. S065746
(To be supplied by the Clerk of the Court)

(Filed Nov. 13, 1997)

INSTRUCTIONS – READ CAREFULLY

- Read the entire form *before* answering any questions.
- This petition must be clearly handwritten in ink or typed. You should exercise care to make sure all answers are true and correct. Because the petition includes a verification, the making of a statement that you know is false may result in a conviction for perjury.
- Answer all applicable questions in the proper spaces. If you need additional space, add an extra page and indicate that your answer is "continued on additional page."

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- If you are filing this petition in the Court of Appeal, file the original and four copies.
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- Notify the Clerk of the Court in writing if you change your address after filing your petition.
- In most cases, the law requires service of a copy of the petition on the district attorney, city attorney, or city prosecutor. See Penal Code section 1475 and Government Code section 72193. You may serve the copy by mail.

Approved by the Judicial Council of California for use under Rules 56.5 and 201(f)(1) of the California Rules of Court [as adopted effective January 1, 1992]. Subsequent amendments to Rule 44(b) may change the number of copies to be furnished the Supreme Court and Court of Appeal.

Form Approved by the
Judicial Council of California
MC-275 [Rev. January 1, 1992]

This petition concerns

#	A conviction	____	Parole
____	A sentence	____	Credits
____	Jail or prison conditions	____	Prison discipline
____	Other *(specify)*: _____		

1. Your name Tony Eugene Saffold
2. Where are you incarcerated? CSP-Solano P.O. Box 4000 Vacaville, Ca. 95696-4000
3. Why are you in custody? [##] Criminal Conviction [ ] Civil Commitment

Answer subdivisions a. through i. to the best of your ability.

a. If criminal conviction, state nature of offense and enhancements (for example, "robbery with use of a deadly weapon") or state reason for civil commitment: Murder/robbery with firearm & assault w/firearm and use of a firearm.

b. Penal or other code sections: 187; 211; and 12022.5; 245(a)(2).

c. Name and location of sentencing or committing court: San Joaquin County Superior Court Stockton, Ca.

d. Case number: 40118

e. Date convicted or committed: April 3, 1990

f. Date sentenced: July 20, 1990

g. Length of sentence: 30 years to life

h. When do you expect to be released? Indeterminate sentence

i. Were you represented by counsel in the trial court? [##] Yes. [ ] No. If yes, state the attorney's name and address: Ralph Cingcon and co-counsel Michael Platt, 125 Bridge PL Suite 201, Stockton, Ca. 95202.

4. What was the LAST plea you entered? (check one)
[##] Not guilty [ ] Guilty
[ ] Nolo Contendere [ ] Other _____

5. If you pleaded not guilty, what kind of trial did you have?
   [##] Jury [ ] Judge without a jury
   [ ] Submitted on transcript
   [ ] Awaiting trial

6. GROUNDS FOR RELIEF

   Ground 1: State briefly the ground on which you base your claim for relief. (For example. "the trial court imposed an illegal enhancement.") *If you have additional grounds for relief, use a separate page for each ground. Page 4 is designed so you can state ground 2. For additional grounds, make copies of page 4 and number the additional grounds in order.* PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF TRIAL COUNSEL TO HIS PREJUDICE

   a. Supporting facts:
   Tell your story briefly without citing cases or law. If you are challenging the legality of your conviction, describe the facts upon which your conviction is based. *If necessary, attach additional pages.* CAUTION: You must state facts, not conclusions. For example, if you are claiming incompetence of counsel you must state facts specifically setting forth what your attorney did or failed to do and how that affected your trial. Failure to allege sufficient facts will result in the denial of your petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.) A rule of thumb to follow is: *who* did exactly *what* to violate your rights at what time *(when)* or place *(where). (If available attach declarations, relevant records, transcripts, or other documents supporting your claim.)*

   Trial counsel failed in the following areas:
   1. He failed to motion to suppress the identification testimony of the key prosecution witness, though the motion would have likely been

successful, and would have been entertained by the trial court.
2. Trial counsel failed to request a pre-trial line up.
3. In lieu of a pre-trial lineup and or a motion to suppress counsel failed to cross-examine the key prosecution witness as to her inconsistent descriptions, her inability to identify anyone positively, and her two prior identifications of someone other then the petitioner, one of those in court in preliminary hearing, leaving the identification unimpeached before the jury.
4. Counsel failed to adequately investigate and prepare for the identification supression motion, and withdrew the motion because of his incompetence. 5. Failed to call crucial alibi witnesses. Please see Memo of law for further facts and argument.

   b. Supporting cases, rules, or other authority (optional):

   (Briefly discuss, or list by name and citation, the cases or other authorities that you think are relevant to your claim. If necessary, attach an extra page.)

   Please see attached memorandum of facts and law

7. Ground 2 *(If applicable)*:

   a. Supporting facts:

   b. Supporting cases, rules, or other authority:

8. Did you appeal from the conviction, sentence, or commitment? [##] Yes. [ ] No. If your answer is yes, give the following information about your appeal:

   Name of court ("Court of Appeal" or "Appellate Dept. of Superior Court")

Third Appellate District

Result Affirmed Date of decision January 27, 1992

Case number or citation of opinion, if known 3 Crim. C009223

Issues raised: a. Court gave erroneous jury instruction.

b. Shoe printed admitted in violation of Kelly-Frye.

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[ ] Yes. [##] No. Result denied

Date of decision _____ Case number or citation of opinion, if known _____

Issues raised: a. Sentencing error.

b. Jury did not reach unanimous decision on statute for murder

c. _____

d. _____

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that he do not file ineffective assistance of counsel claims.

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a. If your petition concerns conditions of confinement or other claims for which there are administrative remedies, failure to exhaust administrative remedies may result in the denial of your petition, even if it is otherwise meritorious. (See *In Re Muszalski* (1975) 52 Cal.App.3d 500 [125 Cal.Rptr. 286].)

Explain what administrative review you sought or explain why you did not seek such review:

b. Did you seek the highest level of administrative review available? [ ] Yes. [ ] No.

Attach documents that show you have exhausted your administrative remedies.

12. Other than direct appeal, have you previously filed any petitions, applications, or motions with respect to this conviction, commitment, or issue in any court? [X] Yes. If yes, continue with number 13. [ ] No. If no, skip to number 15.

13. (1) Name of court SUPERIOR COURT OF CALIFORNIA COUNTY OF SAN JOAQUIN

Nature of proceeding (for example. "habeas corpus petition") HABEAS CORPUS

Issues raised: a. SAME AS THIS PETITION

b. _____

c. _____

Result *(Attach order, if available)* DENIED Date of decision June 9, 1997

(2) Name of court CALIFORNIA COURT OF APPEAL THIRD APPELLATE DISTRICT

Nature of proceeding HABEAS CORPUS

Issues raised: a. SAME AS THIS PETITION

b. _____

c. _____

Result *(Attach order, if available)* Denied Date of decision June 26, 1997 Petitioner served on 11-10-97

For additional prior petitions, applications, or motions, provide the same information on a separate page.

14. If any of the courts listed in number 13 held a hearing, state name of court, date of hearing, nature of hearing, and result.

_____

15. Explain any delay in the discovery of the claimed grounds for relief and in raising the claims in this petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.)

Any delay in this action was caused by appellate counsels failure to raise the issues or investigate the issues on direct appeal, and petitioner had to hire an investigator to gather information and evidence so that he could make the comprehensive showing and prejudice required by this court.

16. Are you presently represented by counsel? [ ] Yes. [X] No. If yes, state the attorney's name and address, if known.

_____

17. Do you have any petition, appeal, or other matter pending in any court? [ ] Yes. [X] No. *If yes, explain.*

_____

18. If this petition might lawfully have been made to a lower court, state the circumstances justifying an application to this court.

This is the proper court

I, the undersigned, say: I am the petitioner in this action. I declare under penalty of perjury under the laws of the State of California that the foregoing allegations and statements are true and correct, except as to matters that are stated on my information and belief, and as to those matters, I believe them to be true.

Date: November 10, 1997

/s/ Tony Eugene Saffold
(Signature of Petitioner)
TONY EUGENE SAFFOLD,
PETITIONER
IN PROPRIA PERSONA

_____

CALIFORNIA STATE SUPREME COURT

TONY EUGENE SAFFOLD,
Petitioner

vs.

ANTHONY NEWLAND
Respondent

Case No. ___

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF PETITION FOR WRIT
OF HABEAS CORPUS

STATEMENT OF THE CASE

Petitioner Tony Eugene Saffold brings this petition for writ of Habeas Corpus from a judgement of conviction after a jury verdict of guilty of violation of Penal Code §187, murder (first degre); two violations of Penal Code §211, robbery; and Penal Code §245(a)(2), assault with a firearm. There were §12022.5 firearm use findings as to all counts except the assault.[1] Petitioner was originally charged by information filed May 29, 1987, with one violation of section 187, two violations of §211, and one violation of §245(a)(2). A robbery specially circumstances was aleged under §190.2(a)(17)(i). (CT 1-3).[2]

Jury trial commenced on November 15, 1989. (CT 738). On March 6, 1990, the court denied Petitioner's

[1] All code references are to the Penal Code, unless otherwise noted.

[2] Clerk Transcripts.

motion to dismiss the specially circumstances allegation. (CT 849-850.)

On April 3, 1990, the jury returned a guilty verdict of first degree murder with a §12022.5., finding, but found the special circumstances allegation not to be proven. The jury also found petitioner guilty of the two counts of robbery, with use findings as to each, and guilty of the section 245(a)(2), assault. (CT 874-875.)

Petitioner's motion for a new trial was denied on June 21, 1990. (CT 1051.)

On July 2, 1990, petitioner was sentenced as follows: a three-year middle term on one of the robbery counts was set as the base term under Penal Code section 1170; a concurrent three-year middle term was imposed on the assault count; a consecutive term of twenty-five years to life was imposed on the murder, with a two-year enhancement. The other robbery counts were stayed pursuant to Penal Code §654. (CT 1052-1053.) Petitioner filed a timely notice of appeal. (CT 1187-1190.)

STATEMENT OF FACTS

A. The evidence of Events Prior to the Homicide.

Rodney Reece, who was originally charged with robbery and murder in this case, testified for the prosecution. (RT 5138.)[3] Reece agreed to testify against Saffold (petitioner) as a part of a negotiated plea in which he pled guilty to robbery. (RT 5011, 5133, 5145, 5147.)

[3] Reporter's transcript.

Reece served approximately three years and five months on the robbery. RT 5151. As an additional benefit, other instances of criminal conduct against Reece were either not charged or dismissed. RT 5136-5137.

Reece testified regarding events on September 28 and 29, 1986. On those days Reece and Mr. Saffold had been driving around in Reece's green and white 1971 Dodge Dart. RT 5085.

Reece claimed he "pawned" a gun to Mr. Saffold in exchange for a $20 rock of cocaine, on September 28th. RT 5038-5039. Reece smoked the cocaine near the house of a Mexican family. RT 5041. After an argument with members of the Mexican family, he was threatened at gunpoint and forced to run away. RT 5044-5050. Reece wanted to get even for the threat, so he retrieved his gun from Saffold. RT 4996, 5067. He then went back and fired several shots at the house. RT 5073-5074.[4]

Later, Reece decided he should return to the house to "finish what he started." He again ran into Mr. Saffold, who warned Reece that, if he returned, the police would arrest him. RT 4997-4998. The two bought some drinks and bought rocks to smoke. RT 4998, 5088. Reece returned the gun to Mr. Saffold, until he could repay him the $20. RT 5089.

At about 1:00 a.m. on September 29, Reece stopped on Eighth Street to offer one Mercedes Cardona a ride. RT 4986, 5090, 5691, 5709. Reece claimed he asked her if she

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[4] Reece also described another incident involving his having shot at a Corvette. RT 5118-5121.

needed a ride, and she threw a beer bottle at him. RT 5988, 5090.

Reece alleged he then slapped Ms. Cardona, and when she screamed, he put her in the car. RT 5988, 5092-5093. After he had inadvertently divulged Saffold's first name, Reece decided he had to kill Ms. Cardona (RT 5990, 5097), and he told her his intent. RT 5104, 5702, 5726.[5] Reece drove to a secluded spot by Johnny's Creek, intending to drown her. RT 4992, 5103, 5701. Ms. Cardona managed to get away and jump in the water. RT 5704. Reece claimed that Saffold had fired shots at the woman. RT 4993, 5109.

(B) The Homicide.

Reece and Saffold later went to buy some beer at the El Mexicali Restaurant on Main Street. According to Reece, it was still daylight. RT 4977.

Reece claimed it was Mr. Saffold's idea to stop there. RT 4978. When they stopped on Sullivan Street, near the El Mexicali, Saffold told Reece he intended to rob the restaurant. Reece started the car again to prevent Mr. Saffold, from doing so. RT 4979.

When Mr. Saffold told Reece he was only joking, so Reece returned to the same spot to allow Saffold could buy the beer. RT 4980. According to Reece, he fell asleep when Saffold left the car. RT 4981. Reece asserted he did not know how long Saffold was gone. RT 4980.

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[5] Cardona stated that the passenger (Saffold) told the driver (Reece) to let her go. RT 5702.

Mrs. Michel was in the kitchen at the El Mexicali Restaurant when the robbery occurred. RT 4853. The restaurant had opened for business at 7:00 a.m. RT 4854. One customer – a short, thin black man – had come in that day prior to the robber. RT 4868-4869.[6]

Mrs. Michel identified Mr. Saffold in court as the second person to come into the restaurant that morning.[7] He had come in two or three minutes after the first customer had left, wearing a yellow, short-sleeved shirt. She was certain it had not been orange. RT 4871-4872.[8] She recognized Mr. Saffold as having been in the restaurant two or three times on previous days. RT 4881.

Mrs. Michel saw the robber enter the restaurant, go to the beer cooler, obtain a beer, and approach the cash register. RT 4882, 4884, 4947. He told Mr. Michel, who was near the cash register, "Give me the money." Mr. Michel replied in Spanish, "What money." The robber thereupon shot Mr. Michel. RT 4890.[9]

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[6] At the preliminary hearing, Mrs. Michel had stated she could not identify the customer. RT 4937. In a statement she gave to police she described the customer as a Mexican male in his 20's. RT 5472.

[7] Mrs. Michel stated that Mr. Saffold, at the time of trial, was a littler heavier with shorter hair than when he had robbed the store. RT 4965-4966.

[8] She told a police officer the suspect was wearing a yellow-gold shirt and had short hair. RT 4939.

[9] Mrs. Michel originally told police that she was not paying much attention before she heard her husband open the cash register to make change. RT 4946.

Mrs. Michel started to scream. A second shot was fired. RT 4891. Mr. Michel came into the kitchen area and threw himself on the floor. RT 4982. He told Mrs. Michel, "Get down, they're going to kill you." RT 4892.

The robber told Mrs. Michel to give him the money. RT 4893. He pointed the gun at her. RT 4957. She complied because she thought he would kill her. RT 4893. She took money out of the register and put it into the bag holding the beer. RT 4894. The man took some food stamps out of the register, put them in the bag, and fled. RT 4895.

(C) Investigation.

The first police officer arrived at the scene at 7:10 a.m. RT 5422. He interviewed Ms. Michel but had some trouble communicating with her in Spanish. RT 5419. The officer did ascertain from Ms. Michel that the suspect was a black male. RT 5419.[10]

The cause of Mr. Michel's death was a single gunshot wound to the left front of his neck. RT 5059. The bullet was recovered and given to police. RT 5059, 5443.[11]

Another officer interviewed Ms. Michel in Spanish at the hospital. RT 5471. Ms. Michel told him she thought the assailant lived in the area, because he had previously been in the store. RT 5481-5492. She described the man as

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[10] He ascertained from another witness, Emilio Junez, that the suspect was wearing a yellow-gold shirt and blue pants. RT 5430.

[11] A second expended bullet was found at the restaurant by police.

a Negro male, 24-26 years old, 5'8" to 5'9", with a thin build, a thin face with a mustache, and a medium to light complexion. RT 5482. The man had brown eyes and black hair about one inch off of his forehead. RT 5483. She stated she would be able to recognize the man. RT 5482.

The police used an electrostatic dust print lifter to obtain footprints at the restaurant. RT 5580-5581. Five footprint impressions were taken and processed into photographs. RT 5622, 5628, 5642.

The police put together a photo lineup which included a photo of Mr. Saffold. The lineup was shown to Ms. Michel on October 3, 1987. RT 5450-5451, 5484. Mrs. Michel identified Mr. Saffold's photograph, stating that she was almost positive it was him. RT 5485-5486, 5502, 5450.[12]

Mrs. Michel was shown several T-shirts including an orange one. She did not identify any of these as being the one worn by the perpetrator. RT 5417.

Police then went to Mr. Saffold's home. RT 5451. Mr. Saffold initially denied who he was. RT 5451-5452. When confronted with the photo that Mrs. Michel had identified, he agreed to go with police. RT 5452. Mr. Saffold was not wearing shoes so his father got a pair of tennis shoes for him to wear. RT 5453.

At the police department, an officer noticed that the tennis shoes were Pro Wings, the brand police believed

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[12] When police showed her a picture of Rodney Reece and asked if that could have been the person, she said definitely not. RT 4963-4964, 5868-5869.

had left the footprints found at the restaurant. RT 5509. There was a trial stipulation that two of the prints lifted from the restaurant matched Mr. Saffold's shoes. RT 5655-5656.

On October 4, the police obtained a search warrant to search Mr. Saffold's house. RT 5458, 5515. They retrieved five yellow shirts, some pants, a firearm, and some loose .22 caliber shells. RT 5516-5519. The police compared the two .22 caliber slugs with slugs test-fired from the gun obtained from the Saffold residence. RT 5662-5663. In the opinion of police, that gun probably was the gun that fired the fatal bullet. They could not state positively because of the damage to the evidence bullet. RT 5673.

(D) Post-Homicide Events.

According to Reece, Saffold had returned to the car and told him he had robbed the store. RT 4983. Reece asked to see the bullets. Reece saw there were three empty cartridges. RT 4985. Mr. Saffold admitted to Mr. Reece having shot someone. RT 5005.[13]

Reece was certain that Mr. Saffold had entered the restaurant with the same orange shirt he had worn the night of September 28th. RT 5200. Reece told Mr. Saffold to change his shirt and to put on one of Reece's shirts. RT 5201.[14]

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[13] When asked if he had killed Michel, Reece stated that he didn't. He said if he had killed Michel he would have killed his wife also. RT 5005.

[14] Reece later gave this shirt to his girlfriend, Carolyn Williams, and told her to hold it for him. He told her that, if

According to Reece, he and Saffold thereafter bought and smoked some more rock cocaine. RT 5011. The two went to McKinley Park where they saw Carolyn Williams. RT 5002. Williams asked Reece where he had been all night, and Mr. Saffold replied, "We've been out pulling 211's." RT 5004.

Ms. Williams testified that she saw Reece and Saffold in McKinley Park at about 8:00 a.m. RT 5285. It was Reece who had bragged that he had robbed some people. RT 5290.

At trial, Ms. Williams denied that Mr. Saffold had made any direct statements to her. RT 5291. She did not recall making different statements to police. RT 5296-5299.[15] She stated that, if she had make conflicting statements to police, it was probably because she was under the influence and mad at Reece. RT 5297. She stated she was a drug user for 21 years and did not remember a lot of things she had said. RT 5309.

Ms. Williams also denied the validity of testimony she had given at Mr. Saffold's preliminary hearing, (RT 5310-5312), stating she either had misunderstood the questions, or hadn't clarified her testimony well enough.

Tony got "busted" and the police came looking for him, he would give police the shirt. RT 5209-5210. Williams acknowledged that Reece had given her the T-shirt, which she later turned over to police. RT 5294, 5548.

[15] Various remarks contained in a statement she gave police were read to Ms. Williams to refresh her recollection. RT 5293-5305.

RT 5312. Anything that was said to her was said by Reece and not by Tony Saffold. RT 5308, 5311, 5313, 5315, 5322.[16]

Audio-taped police interviews of Rodney Reece and Carolyn Williams were made on October 11 and played for the jury. RT 5768, 5863-5864, 5899.[17]

(E) The Defense.

The defense was that Roidney Reece, and not Tony Saffold, had not committed the robbery-murder. The defense acknowledged that Mr. Saffold had entered the restaurant on the morning of the homicide but alleged that he had left the restaurant before the crimes were committed.

Tony Saffold testified that he was shot in 1978. RT 6316. He spent time in a hospital and was treated with morphine for pain. RT 6317. He turned to cocaine in 1979. RT 6318. He acknowledged selling and smoking cocaine. RT 6320.

Mr. Saffold corroborated much of Reece's testimony concerning the incidents prior to the homicide. RT 6330-6334. He said he had changed out of his orange shirt and put on a blue shirt of Reece's, earlier the night of September 28th, while they were at the creek. RT 6337.

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[16] A police officer testified that, when he responded to a call in relation to the beating of Carolyn Williams, Ms. Williams stated that both Reece and Saffold had made incriminating statements to her about the homicide. RT 5544.

[17] Seven excerpts from Ms. Williams' preliminary hearing testimony were read to the jury. RT 5900-5908.

Mr. Saffold stated that he and Reece had spent several hours before daybreak smoking and selling rock cocaine. RT 6339-6340. When Mr. Saffold sold the last of his cocaine he told Reece he wanted to go home. RT 6340.

They drove towards Saffold's house, and Saffold asked Reece to stop so he could get a burrito. RT 6341, 6465. They stopped at the El Mexicali Restaurant. RT 6341. Saffold denied they had parked on Sullivan Street. Saffold said it was had not yet been daylight, but the sun was coming up.[18] Reece asked Saffold whether he thought the place had any money, and Saffold answered no. RT 6341.

Reece asked Saffold to get him a burrito and a beer. Saffold went in, got a beer, and took it to the counter. He asked for two burritos. RT 6341, 6467. Mr. Michel brought the two burritos and gave Saffold his change. RT 6342. Mr. Saffold was in the store for three to five minutes. RT 6468.

Reece dropped Mr. Saffold off at his home, which was a few blocks from the restaurant. RT 6468. Mr. Saffold lay down in the den and fell asleep. RT 6342-6343.

Later that morning, Reece returned to Saffold's house. RT 6343, 6470. Reece convinced Saffold to go and buy some more cocaine, giving Saffold his gun. RT 6344.

They bought and sold some of the cocaine. RT 6344-6345. Thereafter, Saffold at Reece's request accompanied Reece to see Ms. Williams. RT 6345. Mr. Saffold

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[18] There was a stipulation that sunrise that morning had been at 6:59 a.m.

described seeing Ms. Williams with Reece while Mr. Saffold talked to her friend, Donna Heckerson. RT 6347-6348. Reece then took Mr. Saffold home. RT 6349-6350. Reece never gave Saffold the money to retrieve his gun. RT 6350-6352.

Saffold testified that he is almost 6' tall and that, at the time of the homicide, his hair had been collar length in jeri curls. RT 6480-6481. Mr. Saffold denied any involvement in the robbery-murder. RT 6492.

Michelle Hayes testified that, on the morning of September 29, 1986, she had been at a bus stop on Sullivan and Main at about 6:40 or 6:45 a.m. RT 5992-5993. A car door had opened right in front of her. RT 5994. She saw two black males in the car. RT 5994. The car was a faded blue metallic Mustang II.[19] RT 5995. The car drove away but then returned. RT 5999-6000. She saw the passenger, an "older guy," peer around the corner onto Main Street and toward the El Mexicali Restaurant. Her bus then came, and she left. RT 6002, 6019, 6168.[20]

Ms. Hayes was shown two photo lineups by police. RT 6003, 6005. She wasn't sure if she picked Mr. Saffold out of one lineup.[21] RT 6003. She did pick out one Thomas

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[19] The car in defense exhibit 101 was not the car she saw. RT 5997. She was shown a picture of Reece's car by police, which she said she did not recognize. RT 6162, 6179.

[20] She mentioned in her police report the older man was about 35 years old. RT 5998.

[21] In Court, she acknowledged she had said, "It's not really like any of these guys," but that, "If it is like any it's like him," identifying Saffold's photograph. RT 6004.

Ridean out of the other lineup as the passenger in the car. RT 6005-6006.

Emilio Junez was at Sullivan and Main at about 6:45 a.m. on September 29, 1986. RT 6083-6084. About five minutes later he heard loud voices arguing. RT 6085-6086. He heard two shots and saw a man running out of the restaurant. RT 6086. He could not tell the race of the man because he was too far away. He could tell he had short black hair. RT 6087. The man was wearing a yellow shirt and blue pants. RT 6088-6089.[22]

A psychologist, Dr. Robert Shomer, testified on eyewitness identifications. He described his specialty as the factors that go into an eyewitness identification. RT 6229. He described various such factors. RT 6233-6258.

One obvious factor is opportunity to observe the perpetrator. RT 6233. He discussed how the level of stress plays an important role in making an accurate identification. According to research, a person who is under extreme stress is far less accurate in making identifications. RT 6235.

Dr. Shomer described another factor as "weapon focus." He noted that, when a weapon is present, a witness tends to focus on the weapon more than anything else. RT 6257.

Dr. Shomer also discussed the term "unconscious transference." RT 6258. He stated that, if a witness is familiar with someone because the witness had seen the

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[22] He told police the man turned south on Sullivan Street. RT 6048.

person previously, and if the witness later sees the person in a lineup, the witness might identify that individual as the perpetrator because of innocent familiarity. RT 6259.[23]

Maria Castillo testified regarding an incident four days before the homicide in which her purse had been stolen from her car outside the restaurant. RT 5935. Mrs. Castillo described the robber to police as a black man, 22 to 23 years of age, 6 feet tall, with a skinny build, short hair, and a dark complexion, wearing a baseball cap. RT 5937-5938.

Mrs. Michel knew about Mrs. Castillo's purse being stolen, and had been told the robber's description. On the day of the Michel homicide, Mrs. Michel told Mrs. Castillo she thought the killer was the same man who had taken Mrs. Castillo's purse. RT 5939.

Donna Heckerson More testified that she and Carolyn Williams had seen Rodney Reece on September 29, 1986. RT 6096, 6104. While Reece and Williams were talking, Ms. Heckerson sat in Reece's car and had a conversation with a stranger. RT 6106. She could not identify Mr. Saffold as the man, because they only talked for five minutes. RT 6106. She did note that the stranger in the car had shoulder length hair with the wet curly look. RT 6108.[24]

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[23] On cross-examination, Dr. Shomer did acknowledge that unconscious transference is less likely under the circumstances of this case. RT 6303-6304.

[24] While testifying, she did not remember what the stranger was wearing but, in a police statement in 1986, she stated he was wearing a light shirt, with a white tee shirt. RT 6131-6132.

Ms. Heckerson stated that she spoke with Reece the next day about the robbery. RT 6115-6116. At some point Reece acknowledged to Ms. Heckerson that he was involved, but hadn't pulled the trigger. RT 6135. He acknowledged that the description of the suspect sounded like him. RT 6116, 6122. He discussed with her that the described height and the color of the shirt was wrong. RT 6117, 6122, 6135. He showed Heckerson an orange shirt. RT 6117, 6122. Reece said to Heckerson that they got $25 and some food stamps in the robbery. RT 6126.

I.

PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF TRIAL COUNSEL

INTRODUCTION:

The evidence in this case consists of accomplice testimony, where, co-defendant was charged only with robbery, and the murder and other felonies were all dismissed against him, for his testimony, the identification testimony of Mrs. Michel, and other witness testimony that incriminated co-defendant Reece, by witness Ms. Williams and a Michelle Hayes. Petitioner testified on his own behalf.

In the instant case trial counsel failed to request a pre-trial line-up, though he was aware that both Mrs. Michel and Ms. Hayes, had both picked other persons in their photo line-ups, both picking Thomas Rideau. Mrs. Michel, again picked Thomas Rideau at preliminary hearing. CT 141; 142 CT 51; 53 CT 64 RT 5991-6006.

There was further incriminating testimony, against co-defendant Reece by a Ms. Heckerson, who testified Reece admitted his involvement in the robbery and showed Heckerson an orange shirt. RT 6115-6116 6117, 6122.

Trial counsel also failed to raise the issue that the police conducted several photo line-ups trying to obtain an identification of petitioner, in that the witness Ms. Michel was unsure CT 147, 148, 140, 141, 139. CT 8 So the police conducted a single photograph line-up using only the petitioner's picture. (See exhibit A). CT 60-61, 61. Actually counsel made a motion to exclude then withdrew that motion based on evidence that was contrary to Mrs. Michel's testimony, and failing to continue on, based on the prior inconsistent descriptions and picking of other persons.

Trial counsel also failed to impeach the identification testimony of Mrs. Michel, with her prior inconsistent description and that on two occassions she picked someone other than the petitioner, a person also selected by Ms. Hayes, evidence the jury should have been told about. Counsels cross-examination of Mrs. Michel's identification was wholly incompetent.

Trial counsel failed to call alibi witnesses that would have corroborated that petitioner didn't commit any murder and he was at home at the time of the crime. Both Mr. Green Staffold and Mrs..Thelma Saffold, who testified at preliminary hearing CT 128 and 132, were willing and available, however, counsel failed to call them.

After the trial court admonished counsel for failing to adequately prepare and present the motion to exclude

identification testimony, counsel admiting his inadequate preparation, stated he received information that undermined his motion, and withdrew the motion to exclude. Exhibit B at p. 159.

Wherefore, it is conclusive that trial counsel failed to conduct a pre-trial line-up, 2. Failed to litigate a meritorious motion to exclude identification testimony, 3. Failed to inform the jury and impeach the identification witnesses testimony with their prior inconsistent statements, identifications, and description, 4. Filed to adequately prepare for the supression motion, and 5. Failed to call crucial alibi witnesses that corroborated petitioner and other defense and prosecution witnesses.

STANDARD OF REVIEW:

In *Waller v. Georgia*, 467 U.S.39, 46 (1984) the U.S. Supreme Court found that a motion to supress is sometimes more important than the trial itself. *Gannett Co. v. Depasaquale* 443 U.S. 368, 397 (1979).

In *U.S. v. Molina* 934 F. 2d 1440, 1447 (9th Cir. 1991) the Court found that when a client who has been identified in an illegal line-up, most attorney's challenge the admission of any evidence related to it. After all a defendant has everything to gain and nothing to lose in filing a motion to supress, especially one involving the sole eyewitness to that crime.

In *Kimmerlman v. Morrison* 477 U.S.365, 381 (1986) the court found constitutionally deficient representation of

counsel, by counsel who failed to file a timely suppression motion because he had done inadequate pre-trial preparation.

In this case the motion was filed, but inadequate pre-trial investigation and preparation, caused counsel to withdraw the motion.

To determine whether counsel was deficient or not as to filing and litigating the motion, the Court has set out a standard. In *James v. Borg*, 24 F. 3d 20, 24 (9th Cir.) 115 S. ct. 333 (1994), the court held that while under no compulsion to bring an unavailing motion, counsel is bound to raise a meritorious one, and in *U.S. v. Quinter-Barraza* 96 Daily Journal D.A.R. 2631 (9th Cir. March 7, 1996), the Court held a meritorious motion is one that would have had to be entertained by the Court.

In this case, the motion to exclude was based upon very sound evidence. 1. Mrs. Michel testified she was shown a single photograph of the petitioner, by the police and prosecution, patently suggestive, *Stovall v. Denno* 388 U.S.293 (1967); 2. The witness identified someone other than petitioner on two occassions, one of them during preliminary hearing, picking a person consistent with another eyewitness (Ms. Hayes), also not petitioner (they picked the same person), both witnesses gave descriptions other then petitioner's, admitted inattention, and were uncertain at the time of confrontation, failing to meet even one prong of *Neil v. Biggers* 409 U.S. 188, 200-201 (1972), 3. The procedure of using a single photograph of a suspect, to single him out is a violation of due process *People v. Hunt* (1977) 19 Cal. 3d 888, 894, *People v. Phan* (1993) 14 al. App. 4th 1453. 4. The multiple photo

line-ups, with the single photo of petitioner, considered with both Mrs. Michel and MrsHayes, picking the same other person, (Ms. Michel on two occassions), the lack of certainty at confrontation, the length of time between confrontation, the wrong physical description, and inconsistent descriptions, with both witnesses lack of attention, leads to the conclusion that a misidentification took place. *Marsden v. Moore* 847 F. 2d ___ (1988) cert. denied 488 U.S. 983.

The witnesses stated the man had short hair, petitioner had a long juri curl, petitioner had a shorter mustash, petitioner had chin hair, the suspect did not CT 147, 148, 140-141, her statement was only that petitioner looked like the person, except his hair was to long, his mustash was to long, and he had chin hair, the suspect did not. None of the clothes taken from petit- and his home were identified by the witnesses. The witness was shown a photo line-up in Oct. 1986, CT 50, on March 13, 1987, CT 139, another line-up in March 1987, where she picked someone else CT. 141, and a single photograph of petitioner later on CT 61.

Then on October 3, 1986, just a few days after the shooting, Ms. Michel's identification was uncertain and she stated hair to long, chin hair wasn't there, etc. and three photo line-ups later, she picked someone else, and then was shown a single photograph of petitioner. This repeated showing of photo's and then a single photograph to an uncertain witness, meets the standard of suggestiveness, petitioner is required to show under *U.S. v. Simmons* (1968) 390 U.S.377. See also *Gilbert v. California* (1967) 388 U.S. 263.

We have got to see here, that the court had to entertain the motion to exclude the identification testimony of both Mrs. Michel and Ms. Hayes under the *Biggers Supra* standards, and the suggestiveness standards of *Simmons Supra*.

Counsel was ineffective for his failure to investigate and adequately prepare and litigate a motion to suppress Mrs. Michel's identification and Ms. Hayes, as it was likely that he would have prevailed. *Tomlin v. Myers* 30 F. 3d 1235 (9th Cir. 1994).

Next we find that counsel failed to request a pre-trial line-up, especially where a misidentification had already occurred, i.e., two witnesses picked the same person from photo's that contained petitioner's, they were uncertain, and procedures were occuring that were likely to cause misidentification. *Evans v. Superior Court* (1974) 11 Cal. 3d 617, and it should have been conducted prior to preliminary hearing, based on the facts known to counsel, i.e., the inadequate descriptions, the multiple photo line-ups, the picking of other people, the single photo line-up, the victims uncertainy. In *People v. Rivera* (1981) 127 Ci 3d 136, 148 cert. denied 457 U.S. 1123 failure to conduct a line-up, resulted in a one on one line-up in court, where the witness had no independent recollection of the petitioner, and had been totally inconsistent on all identification attempts.

Counsel is bound by duty and law to zealously represent his client, using every legal means available to present a defense and protect his clients rights. *Sanders v. Ratelle* 21 F. 3d 1446 (9th Cir. 1994), here counsel even failed to consider a physical line-up, with several men

that are similar, and, using the record as a basis, would have resulted in the witnesses inability to pick out petitioner. Counsel failed again here.

Next, we must examine counsel's cross-examination of Mrs. Michel, on her identification. Even if he had failed to get her testimony excluded as to identification the jury had the right to know, and it was crucial they knew, that Mrs. Michel on two occassions, and Ms. Hayes, both identified a Thomas Rideau positively as the suspect in this case. CT 64, and the court ruled that identification was positive, and it was Thomas Rideau. CT 141-142.

However, the jury was never to hear about these extra-judicial and in court identifications of another person, as counsel failed to cross-examine either witness as to these prior identifications. Reviewing counsel's competency on this issue, the the court must assume the damaging potential of the cross-examination would have been realized fully by the jury. *U.S. v. Vargas* (9th Cir. 1991) 933 F. 2d 701, 709. Indeed, where two witnesses pick the same person, and the physical description they give, which is different than petitioner's, and thereby exculpatory evidence. *Government of Virginia Islands v. Mills* (3rd Cir. 1992) 956 F. 2d 443, 444 it is likely would have had a powerful effect on the jury.

Further evidence relevant to witnesses credibility, petitioner had a right for the jury to know *U.S. v. Brumel-Alvarez* 96 Dily Journal D.A.R. 13150 (9th Cir. Oct. 30, 1996), and that evidence would have underminded the prosecutions evidence. (i.e. the credibility of the identification), it thereby undermines the confidence in the outcome. *Kyles v. Whitely* 115 S. ct. 1555, 1566 (1995).

Further it was counsel's duty as competent counsel to impeach the key prosecution witness and the only crucial evidence against petitioner, and failure to do so, was ineffective assistance of counsel. *Foltz v. Blackburn* 56 LW 3641 (6th Cir. 9/17/87).

Also, counsel, in his failure to litigate the motion to suppress, could have brought to light the multiple photo line-ups, the witnesses uncertainy at each, the characteristics, i.e., hair, mustash, and chin hair, the inability to identify any of petitioner's clothes as those worn, and the single photo line-up, before the jury, to impeach the credibility of the identification, and the underhanded methods of the prosecution, who appears was willing to leave this evidence undisclosed to the jury. *Watkins v. Sowders* 449 U.S. 341 (1981); *U.S. v. Davenport 753 F. 2d 1460, 1462 (9th Cir. 1985), each indicate such inquiry is proper before a jury, in that the question of reliability is traditionally one for the jury. Watkins Supra* at 347.

Counsel, did none of this and the jury was unaware of this crucial evidene on reliablity, where fore, petitioner believes counsel was incompetent.

Last, we must consider counsel's failure to call alibi witnesses, this is crucial in that 1. co-defendant's testimony was insufficient to convict. Cal Penal Code Sc. 1111, 2. co-defendant was impeached by petitioner, Ms. Williams and Ms. Hkcerson, and in fact admited the robbery and owning the orange shirt, etc. 3. The identification was weak and likely a misidentification, 4. Heckerson corroborates Williams trial testimony that co-defendant is the only one who talked about a robbery and

petitioner was not within hearing distance, 5. Places petitioner somewhere else at the time of the crime, and corroborates his own testimony and that of Williams and Heckerson.

Counsel's failure to call petitioner's alibi witnesses that corroborate and exonerate petitioner is traditionally, ineffective assistance, and cannot be tactical. *U.S.v. De Banco* 780 F. 2d 81, 85 (D.C. Cir. 1986); *Thomas v. Lockhart* 738 F. 2d 304, 308 8th Cir. 1984) cert. denied 474 U.S.1073 (1986), or as put in *Chambers v. Armontrout* 885 F. 2d 1318 (8th Cir. 1989) citing *Strickland v. Washington* 466 U.S.668 (1984) at 694-95; *Sanders v. Trickey* 875 F. 2d 205, 208 (8th Cir. 1989) the standard of prejudice is a reasonable probability sufficient to undermine confidence in the outcome.

Wherefore, under the *Strickland Supra*, standard, there can be no finding otherwise, counsel's inadequate performance, his bumbling incompetence, and his failure to prepare, is overwhelming supported in the record, shows counsel's error's were sufficient to deny petitioner several meritorious defenses, any of which reasonably would have, if presented, undermined the outcome of the trial, and would potentially have exonerated this petitioner.

Therefore, petitioner believes that Habeas Corpus should issue, but not less than an evidentiary hearing where petitioner can question counsel, and the juror's exhibited in exhibits C and D. Counsel also put the wrong name in the Motion to Exclude Identification Evidence. Thomas Rideau photo was picked at preliminary hearing, not Steven Rockingham, by the victim's wife. She picked Rockingham's photo on another occassion.

Dated November 10, 1997

Respectfully submitted,

/s/ Tony E. Saffold
Tony E. Saffold,
Petitioner
In Propria Persona

Saffold E-62266

IN-COMING LEGAL – April '97-Nov. '97

April 22: D. Fry & Assoc. – P.I. Stockton
Schraer – Atty. – San Diego
15: Schraer – Atty. – San Diego
Schraer – Atty. – San Diego
14: D. Fry & Assoc. – Stockton

May 27: Superior Court – Stockton
22: Schraer – Atty. – San Diego
12: D. Fry & Assoc. – PI – Stockton
5: Superior Court – Stockton

June 24: Schraer – Atty. – San Diego
19: D. Fry & Assoc. – Stockton
12: Superior Court – Stockton
9: Schraer – Atty. – San Diego
6: Private Inv. – Stockton

July 23: Fry-Private Inv. – Stockton
3: Associates – Stockton

August 6: Schraer – Law – San Diego

September: None

October: None

November 17: Supreme Court – S.F.

PETITION UNDER 28 USC § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

AO 241 (Rev. 5/85)

United States District Court

District Eastern

Name Tony Eugene Saffold

Prisoner No. E-62266

Case No.

Place of Confinement
CSP-Solano P.O. Box 4000/6-220L
Vacaville, Ca. 95696-4000

CIV. S-98-1040
DFL JFM P

(Filed Jun. 4, 1998)

Name of Petitioner (include name under which convicted)	Name of Respondent (authorized person having custody of petitioner)
TONY EUGENE SAFFOLD	v. ANTHONY NEWLAND

The Attorney General of the State of: CALIFORNIA

PETITION

1. Name and location of court which entered the judgment of conviction under attack San Joaquin County Superior Court, in Stockton, Ca.

2. Date of judgment of conviction April 3, 1990

3. Length of sentence 30 years to life

4. Nature of offense involved (all counts) Murder robbery w/firearm; assault w/firearm & use of firearm. Penal Code sections 187; 211; 12022.5; and 245(a)(2).

5. What was your plea? (Check one)

   (a) Not guilty ##

   (b) Guilty __

   (c) Nolo contendere __

   If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details: _____

   _____

6. If you pleaded not guilty, what kind of trial did you have? (Check one)

   (a) Jury ##

   (b) Judge only __

7. Did you testify at the trial?

   Yes # No _

8. Did you appeal from the judgment of conviction?

   Yes # No _

9. If you did appeal answer the following:

   (a) Name of court Calif., Court of Appeal, Third Appellate District

   (b) Result Affirmed

   (c) Date of result and citation, if known January 27, 1993 3 Crim. C009223

   (d) Grounds raised Court gave erroneous jury instruction; Kell-Frye violation; sentencing error; and jury failed to reach unaminous decision on statutory law as to murder.

   (e) If you sought further review of the decision on appeal by a higher state court, please answer the following:

   (1) Name of court

   (2) Result _____

   _____

   (3) Date of result and citation, if known ___

   (4) Grounds raised _____

   _____

   (f) If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to each direct appeal:

   (1) Name of court _____

   (2) Result _____

   _____

   (3) Date or result and citation, if known ___

   (4) Grounds raised _____

   _____

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?
    Yes # No _

11. If your answer to 10 was "yes," give the following information:

    (a) (1) Name of court San Joaquin County Superior Court

(2) Nature of proceeding Habeas corpus

(3) Grounds raised Trial counsel provided ineffective assistance of counsel. See accompanied memorandum of points and authorities.

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes _ No #

(5) Result denied

(6) Date of result June 9, 1997

(b) As to any second petition, application or motion give the same information:

(1) Name of court Calif. Court of Appeal, Third Appellate District

(2) Nature of proceeding Habeas Corpus

(3) Grounds raised Same as above

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes _ No #

(5) Result denied

(6) Date of result June 26, 1997

(c) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes # No _

(2) Second petition, etc. Yes _ No _

(d) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

A. Ground one: Denial of effective assistance of counsel

Supporting FACTS (state *briefly* without citing cases or law) See, accompanied memorandum of points and authorities in support of petition for writ of habeas corpus.

B. Ground two: same as above

Supporting FACTS (state *briefly* without citing cases or law):

C. Ground three: same as above

Supporting FACTS (state *briefly* without citing cases or law):

D. Ground four: same as above

Supporting FACTS (state *briefly* without citing cases or law):

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were *not* so presented, and give your reasons for not presenting them:

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?
Yes _ No #

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing Patricia Fergusion, Deputy Public Defender, County of San Joaquin, 24 S. Hunter St. Stockton, Ca. 95202

(b) At arraignment and plea Ralph Cingcon & co-counsel Michael Platt, 125 Bridge Pl Suite 201, Stockton, Ca. 95202

(c) At trial Same as latter of above

(d) At sentencing Same as above

(e) On appeal Kyle Gee, 2626 Harrison St. Oakland, Ca. 94612

(f) In any post-conviction proceeding Pro Se

(g) On appeal from any adverse ruling in a post-conviction proceeding Kyle Gee, 2626 Harrison St. Oakland, Ca. 94612

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

Yes # No _

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes _ No #

(a) If so, give name and location of court which imposed sentence to be served in the future:

(b) Give date and length of the above sentence:

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
Yes _ No _

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 2, 1998.
(date)

/s/ Tony E. Saffold
Signature of Petitioner

TONY EUGENE SAFFOLD
CSP SOLANO / E-62266
P.O. BOX 4000 / 6-220L
VACAVILLE, CA. 95696-4000

Petitioner In Pro Se

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

TONY EUGENE SAFFOLD, Petitioner,	)	Case No. _____ (Sup. Ct. No. SC40118A)
v.	)	PETITIONER'S
ANTHONY NEWLAND, Respondent.	)	DECLARATION: IN REFERENCE TO THE DATES IN WHICH HE HANDED OVER HIS PETITIONS TO PRISON OFFICIALS FOR MAILING AND THE DATES IN WHICH HE RECEIVED RESPONSES FROM THE COURTS ON HIS SAID PETITIONS

DECLARATION

I, Tony Eugene Saffold, declare under the penalty of perjury as follows:

1. I am the petitioner in this action.

2. On April 17, 1997, I placed my petition for writ of habeas corpus in the possession of prison guards for mailing distribution to the San Joaquin County Superior

Court. However, the court's record reflect that my application for habeas corpus relief was not filed until May 1, 1997.

3. On June 9, 1997, the San Joaquin County Superior Court denied my habeas relief. On June 14, 1997, I received this denial from prison officials (guards).

4. On June 15, I placed my petition for habeas corpus relief in the possession of prison guards for mailing distribution to the California Appellate Court, Third Appellate district. The petition was filed by that court on June 18, 1997.

5. On June 26, 1997, the California Court of Appeal, Third Appellate district denied my habeas relief. However, I was never informed of this denial from any prison officials. I was never issued any legal mail with respect to the court's denail.

6. I have been unsuccessfully trying to obtain a copy of the prison's record on the legal mail delivery to inmates.

7. In November 1997, I wrote the California Court of Appeal, Third Appellate District expressing concern as to the status of my pending petition. It was at that time when I discovered that my petition had been denied by that court on June 26, 1997.

8. It was on November 10, 1997, that I received from the California Appellate court the information and a copy of its denial of my petition.

9. On November 10, 1997. I placed my petition for writ of habeas corpus in the possession of a prison guard to be mailed to the California Supreme Court.

10. On June 2, 1998, I received via prison delivery of inmate legal mail the denial of my petition to the State Supreme Court.

11. On June 2, 1998, I placed my petition for writ of habeas corpus in possession of a prison guard for mailing to the United states district court.

I, the undersigned, say: I am the petitioner in this action. I declare under the penalty of perjury that the foregoing is true and correct and from my own knowledge. Executed on June 2, 1998, 3 at California State prison, in Vacaville, Ca. 95696-4000

TONY EUGENE SAFFOLD
Petitioner In Pro Se

TONY EUGENE SAFFOLD
E-62266
CSP-SOLANO
P.O. BOX 4000
VACAVILLE, CA. 95696-4000

Petitioner In pro Se

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

TONY EUGENE SAFFOLD,
Petitioner,
v.
ANTHONY NEWLAND,
Respondent.
_____/

No. CIV S-98-1040 DFL JFM P

AMENDED DECLARATION OF TONY EUGENE SAFFOLD

AMENDED DECLARATION

I, Tony Eugene Saffold, am the petitioner in this action. I declare under the penalty of perjury as follows:

(1) On April 17, 1997, I placed my petition for writ of habeas corpus in prison authorities possession to be forwarded to the Superior Court of San Joaquin County.

(2) On June 14, 1997, I placed my petition for writ of habeas corpus in the possession of prison authorities to be forward to the California Court of Appeal, Third Appellate District.

(3) On November 10, 1997, I placed my petition for writ of habeas corpus in the possession of prison authorities to be forwarded to the California Supreme Court.

(4) On June 2, 1998, I placed my petition for writ of habeas corpus in the possession of prison authorities to be forwarded to the United States District Court – Eastern District for California.

(5) I did not receive the California Court of Appeal – Third Appeal District judgment denying my application for habeas corpus relief until November 10, 1997, when I wrote that court then I was sent the denial of the petition.

In sum, I handed over my petitions to prison authorities on the above stated dates. And I did not receive the California Court of Appeal – Third Appellate District order / judgment denying my petition until November 10, 1997.

I declare under the penalty of perjury that the foregoing is true and correct. Executed on November 24, 1998, at CSP-Solano, in Vacaville, Ca.

/s/ Tony Eugene Saffold
TONY EUGENE SAFFOLD
Petitioner In Pro Se

TONY EUGENE SAFFOLD
E-62266
CSP-SOLANO
P.O. BOX 4000
VACAVILLE, CA. 95696-4000

Petitioner In Pro Se

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

TONY EUGENE SAFFOLD,

Petitioner,

v.

ANTHONY NEWLAND,

Respondent.

_____/

Case No.
CIV S-98-1040
DFL JFM P

(Filed Sep. 21, 1998)

RESPONSE TO RESPONDENT'S MOTION TO DISMISS AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

* * *

a. In The Instant Case The State Created An Impediment In Violation Of The Constitution Or Laws Of The United States That Prevented Petitioner From Filing His Application

In this case an impediment was created by State action in violation of the Constitution or laws of the United States which prevented Petitioner from filing his

application. 28 U.S.C. §2244(d). On June 14, 1997,[2] Petitioner filed a petition for writ of habeas corpus with the California Court of Appeal, Third Appellate District, in case number CO26811. Respondent's Motion to Dismiss; Exh. F. Respondent assert that the petition to the State Appellate Court was denied on June 26, 1997. Respondent's Motion to Dismiss at 4. However, Petitioner was not put on notice that the California Court of Appeal, Third Appellate District had denied his application for habeas corpus relief until November 10, 1997. This fact was not discovered until Petitioner Wrote the California Court of Appeal, Third Appellate District inquiring as to the status of his pending habeas petition. *See* Attachment A. and B. After filing the instant application for writ of habeas corpus in this Court Petitioner diligently attempted to obtain from the prison a copy of the record – which is recorded by the inmate signing for all incoming legal mail. However, his attempts were to no avail. Petitioner went to the extent of filing an INMATE/PAROLE APPEAL FORM. However, the prison authorities refused to provide

* * *

limitation period for a petition for writ of habeas corpus by a state prison er pursuant to the non-capital judgment of a state court. Section 2244(d)(1) provides in part:

> (D)(1) A 1-year period of limitation shall apply to an application for writ of habeas corpus by a person in custody pursuant to the

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[2] Under the mailbox rule the habeas petition was filed on June 14, 1997, and not June 18, 1997, as respondent assert. This issue will be further discussed herein below.

judgment of a State court. The limitation period shall run from the latest of –

(D) the date on which the factual predicate of the claim or cliams presented could have been discovered through the exercise of due diligence.

In the instant case there are factual predicates of the claims presented which the exercise of due diligence were discovered on May 8, 1997. *See* Petition for writ of habeas corpus: Appendix A.

In this case, Petitioner presented a particular claim, i.e., ineffective assistance of trial counsel for failing to impeach the prosecution's key witness. Petition at 18. In order for Petitioner to develop the factual predicate of the ineffective assistance of counsel claim it was imperative that he meet his burden in establishing prejudice thereof. The declarations and statements from the jurors at (Petition; App. A) was necessary in order for Petitioner to establish the prejudice prong on ineffective assistance of trial counsel.

To prevail on a Sixth Amendment claim the defendant "must show both that counsel's representation fell below an objective standard of reasonableness, and that there exist a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986) (citing *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984)). Thus, the discovery of evidence to establish the prejudice prong is a factual predicate of a claim. Here, that evidence derived from the jurors statements with respect to whether or not it would have raised doubt in their minds and undermined the prosecution's case

had they known the prosecution's key witness had identified two other guys on two separate occasions as the culprits. Without this information from the jurors it would have been next to impossible for Petitioner to establish his burden of showing that he was prejudiced by trial counsel's ineffectiveness.

Petitioner submits he had no way of knowing how to contact the jurors, in fact, his trying to contact them on his own might have very well been a violation of law. In any event, he had no knowledge whatsoever as to full names, addresses and phone numbers, or work place. In addition, he was not financially able to hire a private investigator to seek this information out and make contact with the jurors and try to elicit information in the form of statements which might have been important to his claim. When Petitioner's family members were finally able to hire a private investigator for him he did not know what to expect. Whether the jurors would discuss the matter at all? Whether it would have raised doubt in their minds had they known the prosecution's key witness had identified two other guys on two separate occasions as the – culprits of the murder and robber? However, Petitioner knew in order for to establish that he was prejudiced by his trial counsel's ineffectiveness he had to seek this information from the jurors.

Petitioner contends the date on which the factual predicate of the claim presented could have been discovered through the exercise of due diligence is February 1997. This the date his family retained Audrey M. Frey (Private Investigator) to attempt to locate the jurors who served at his trial. Petition: App. A. Whereas, Mrs.

Audrey M. Fry located several of the jurors and asked specific series of questions. Id.

As is illustrated above the statements from the jurors constitute a factual predicate of the ineffective assistance of counsel claim presented in his habeas petition to this Court. Likewise, February 1997 is the date on which the factual predicate of the claim presented could have been discovered through the exercise of due diligence. Petitioner incorporates by reference his claim on ineffective assistance of counsel at (Petition at 18-36; and App. A) to support his position here.

Pursuant to §2244(d)(1), (D) Petitioner's 1-year period of limitation did not commence until February 1997, which means he had until February 1998 to file his habeas petition with this Court. Thus, pursuant to the equitable tolling provision of 28 U.S.C. §2244(D)(2), the time during which a properly filed application for State post-conviction or other collateral review with respect to pertinent judgment or claim is pending shall not be counted toward any period of limitation. Therefore, the time with which Petitioner's habeas petition was pending with the state courts, i.e., superior court, court of appeal, and Supreme Court shall not be counted toward any period of limitation. Accordingly, Petitioner's habeas corpus petition filed with this Court on June 4, 1998, should not be dismissed as untimely. Thus, Respondent's motion to dismiss should be denied.

III

PETITIONER HAS EXHAUSTED HIS STATE REMEDIES WITH RESPECT TO HIS HABEAS CORPUS CLAIMS RAISED BEFORE THIS COURT, EXCEPT HIS INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WAS NOT DISPOSED OF BY THE HIGHEST STATE COURT

Petitioner submits that his ineffective assistance of appellate counsel claim (memorandum of points and authorities in support of petition for writ of habeas corpus at page 60; claim V). Respondent's assertion that Petitioner has not provided the highest state court an opportunity to rule on the "merits of each of his claims" (Respondent's Motion to Dismiss at 10) is unsupported by the record. As is shown at (Respondent's Motion to Dismiss: Exh. G), Petitioner provided the highest state court an opportunity to rule on the merits of each of his claims before this Court, except the ineffective assistance of appellate counsel claim. Thus, except for the ineffective assistance of appellate counsel claim all of Petitioner's claims are properly exhausted.

Instead of dismissing his habeas petition Petitioner moves this Court to dismiss only the ineffective assistance of appellate counsel claim. Thereby, the issues contained in his habeas petition are properly exhausted.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JUDGMENT IN A CIVIL CASE

Saffold
v.
Newland

CASE NUMBER: CIV S-98-1040 DFL JFM P
(Filed Jan. 6, 1999)

XX – **Decision by the Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER OF JANUARY 6, 1999.

Jack L. Wagner,
Clerk of the Court

ENTERED: January 6, 1999

by: /s/ G Miyasato
G Miyasato, Deputy Clerk

TONY EUGENE SAFFOLD
E-62266
CSP-SOLANO
P.O. BOX 4000
VACAVILLE, CA. 95696-4000

Petitioner In Pro Se

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

TONY EUGENE SAFFOLD,
Petitioner-Appellant.
v.
ANTHONY NEWLAND,
Respondent-Appellee.
_____/

Case No. CIV S-98-1040 DFL JFM P

NOTICE OF APPEAL
(Filed Jan. 14, 1999)

Notice is hereby given that Petitioner-Appellant Tony Eugene Saffold, in pro se, in the above named case, appeals to the United States Court of Appeals for the Ninth Circuit from the final order/judgment entered in this action on January 6, 1999, granting respondent's motion to dismiss petition for writ of habeas corpus, as untimely pursuant to 28 U.S.C. §2244(d).

Date: January 12, 1999

Respectfully submitted,

/s/ Tony Eugene Saffold
TONY EUGENE SAFFOLD
Petitioner-Appellant In Pro Se